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No. 02-679

In the Supreme Court of the United States

DESERT PALACE, INC., DBA CAESARS PALACE HOTEL & CASINO,

Petitioner,

v.

CATHARINA F. COSTA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) and its 67 state and local affiliates have a membership of over 3,000 attorneys, and NELA is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the proper interpretation and application of Title VII to insure that the rights of workers are fully protected. For example, NELA participated in filing *amicus curiae* briefs in this Court's decisions in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); and *West v. Gibson*, 527 U.S. 212 (1999).

NELA members represent thousands of individuals in this country who have suffered unlawful employment discrimination, including sex discrimination. The interest of NELA in this case is to protect the rights of its members' clients, by ensuring that the goals of Title VII and the Civil Rights Act of 1991 to eradicate employment discrimination are fully realized. NELA submits this brief because of the importance of the issues at bar to furthering its goals. For these reasons, *amicus* respectfully request that the Court consider its views in support of the Respondent.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than the *amicus curiae*, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

INTRODUCTION

The Civil Rights Act of 1991 embodies the intention of Congress to strengthen and improve laws redressing unlawful discrimination. In particular, the Act states that employers in mixed-motive cases will incur at least limited liability if an employee can prove that unlawful discrimination was a motivating factor for an employment practice. Petitioner urges reversal of the court below on the ground that the employee must use direct evidence to prove that unlawful discrimination was a motivating factor. However, nothing in the Act or the section in question limits proof to direct evidence. Grafting such a requirement onto this section would weaken rather than strengthen the civil rights laws.

SUMMARY OF ARGUMENT

This Court's analysis should begin with the Civil Rights Act of 1991. It was enacted "to strengthen and improve federal civil rights laws," not merely as a response to Supreme Court cases favoring the employer. This Act does not contain a requirement that an employee establish *through direct evidence* that unlawful discrimination was a motivating factor for an employment practice. Based on the plain meaning of Section 107(a) of the Act there is no requirement that proof must be limited to direct evidence.

The Civil Rights Act of 1991 evidences a strong intent by Congress that workplaces should be free of unlawful discrimination. A strong inference exists that Congress intended to create an incentive for employers to ensure that their workplaces avoid unlawful discrimination. Consequently, it appropriate for this Court to provide *Faragher* type guidance to employers.

The arguments made on behalf of Petitioner are not consistent with the Civil Rights Act of 1991. First, Justice

O'Connor's concurrence in *Price Waterhouse* does not control the instant matter. Second, there is no basis to construe the Civil Rights Act of 1991 narrowly. Third, fears of a greater liability rate are no basis to require direct evidence in mixed-motive cases. Finally, jury instructions can be crafted as needed to state correctly mixed motive law under the Civil Rights Act of 1991.

ARGUMENT

I. THIS COURT'S ANALYSIS SHOULD BEGIN WITH THE CIVIL RIGHTS ACT OF 1991

The statutory provision at the heart of this case is 42 U.S.C. §2000e-2(m). It provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 107(a) of the Civil Rights Act of 1991 added this provision. It was one of many fundamental changes to Title VII of the Civil Rights Act of 1964, resulting from the 1991 Act.

Petitioner has framed the question presented in terms of the "analysis set out in *Price Waterhouse v. Hopkins*." However, phrasing the question in that manner assumes that the *Price Waterhouse* statutory construction analysis was not superseded by the language of the 1991 Act. "[I]n every case involving the construction of a statute, [the Court's] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Accordingly, a better way to phrase the question presented is: "Whether a plaintiff in a Title VII case must adduce direct evidence of discriminatory intent to

establish an unlawful employment practice as provided by Section 107(a) of the Civil Rights Act of 1991, codified as 42 U.S.C. §2000e-2(m)."

A. THE CIVIL RIGHTS ACT OF 1991 WAS ENACTED "TO STRENGTHEN AND IMPROVE FEDERAL CIVIL RIGHTS LAWS," NOT MERELY AS A RESPONSE TO SUPREME COURT CASES FAVORING EMPLOYERS.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), certainly prompted the inclusion of section 107(a) in the 1991 Civil Rights Act. But the backdrop for this section and for the Act itself is much broader. Two primary purposes were stated for the Act:

> The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

H.R. Rep. No. 40 (II), 102nd Cong., 1st Sess. 1991, 1991 U.S.C.C.A.N. 549, 1991 WL 87020 (Leg.Hist.) *1.

The preamble reflects the fact that the Civil Rights Act of 1991 is not just a reaction to *Price Waterhouse* and other Supreme Court employment decisions. The Act was intended to "amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws." PL 102-166, November 21, 1991, 105 Stat 1071. The Congressional findings further demonstrate that the scope of the Act is broader than the Supreme Court employment decisions which had recently preceded its enactment:

> The Congress finds that—
>
> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
>
> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
>
> (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Id. at §2. *See generally U.S. v. Turkette*, 452 U.S. 576, 588-89 (1981) (findings of RICO statute reflect the broad need for its enactment).

The first purpose listed for the Act is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." The fourth listed purpose is "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." PL 102-166, November 21, 1991, 105 Stat 1071, §3. Consequently, section 107(a) should not be read merely as a reaction to the *Price Waterhouse* decision.

Compensatory and punitive damages are now part of the fabric of Title VII cases. This is because of the sweeping changes brought by the Civil Rights Act of 1991. PL 102-166, November 21, 1991, 105 Stat 1071, §102, *codified at* 42 U.S.C. §1981a. In 1989, when this Court's *Price Waterhouse* decision was issued, these remedies were not available. Another important development resulting from the Civil Rights Act of 1991 is the right to a jury trial in Title VII cases. *Id.* Previously, trials of all Title VII cases were decided by district court judges without a jury. In sum, the Civil Rights Act of 1991 effected changes

in federal civil rights law which are much broader than the Supreme Court cases which were addressed in the Act.

B. THE CIVIL RIGHTS ACT OF 1991 DOES NOT CONTAIN A DIRECT EVIDENCE REQUIREMENT FOR MIXED MOTIVE CASES.

The Civil Rights Act of 1991 provides employers an affirmative defense which limits the employee's remedies if the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. §2000e-5(g)(2)(B). Nothing in the 1991 Act generally, or in section 107(a) particularly, requires that an employee establish through direct evidence that unlawful discrimination was a motivating factor. There is nothing in the Act or section 107(a) which even hints that Congress intended to limit proof of mixed-motive discrimination to direct evidence. Rather, the Act evidences an intent on the part of Congress to eradicate unlawful discrimination regardless of whether the evidence is circumstantial or direct.

It is well-settled that, when construing statutory provisions, courts must look first to the plain meaning of the statutory language. *E.g.*, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The meaning of section 107(a) is plain. Nothing in this section or the Act as a whole requires that a "mixed motive" be established by direct evidence. The Preamble, the Congressional Findings and Purposes of the Civil Rights

Act of 1991 Act are unambiguous; a primary purpose of the Act is to strengthen and improve civil rights laws. Therefore, there is no basis or reason to analyze or apply Justice O'Connor's concurring opinion in *Price Waterhouse*. That opinion pertains to a judicial interpretation of Title VII which was superseded by the 1991 Amendments. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002) (*en banc* opinion). *See also Wolff v. Brown*, 128 F.3d 682 (8th Cir. 1997) (direct evidence not stated as requirement in mixed motive case).

Given the "sea-level" changes to Title VII of the Civil Rights Act of 1964, there is no basis to conclude that Congress intended to limit changes in the law pertaining to mixed motive cases only to cases where direct evidence is available. Congress *did not* write this requirement into the statute. Requiring the presentation of direct evidence in mixed-motive cases to establish that unlawful discrimination is a motivating factor for an employment practice is contrary to the Title VH of the Civil Rights Act of 1964, as amended and established Supreme Court precedent pertaining to the construction of statutes.

II. THE CIVIL RIGHTS ACT OF 1991 EVIDENCES A STRONG INTENT BY CONGRESS THAT WORKPLACES SHOULD BE FREE OF UNLAWFUL DISCRIMINATION.

A. THERE EXISTS A STRONG INFERENCE THAT CONGRESS INTENDED TO CREATE AN INCENTIVE FOR EMPLOYERS TO ENSURE THAT THEIR WORKPLACES AVOID UNLAWFUL DISCRIMINATION.

When a jury finds that employer's treatment of an employee is based on an unlawful motive, the employer has crossed a "threshold" and engaged in conduct explicitly prohibited by Congress. The 1991 Amendment provides

limited liability in such circumstances even if the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. §2000e-5(g)(2)(B). Regardless of whether proof of unlawful discrimination is direct or circumstantial, the employer should take all necessary measures to keep its workplace free of unlawful discrimination. *See* CIVIL RIGHTS ACT OF 1990—Hon. Augustus F. Hawkins (Extension of Remarks—February 7, 1990) ("any reliance on prejudice in making employment decisions is illegal"). Affirming the court below will send a message to employers that proactive measures are needed to comply with all types of discrimination prohibited by Title VII, not just sexual harassment situations.

B. *FARAGHER* TYPE GUIDANCE FOR EMPLOYERS IS NEEDED.

The primary purpose of Title VII "is not to provide redress but to avoid harm." *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 545 (1999), *quoting Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). *Faragher* involved a sexual harassment situation which violated the sex discrimination provision of Title VII. The Civil Rights Act of 1991 does provide additional means of redress but the ultimate goal is to avoid and discourage unlawful discrimination.

Enforcing the plain language of section 107(a) of the Civil Rights Act of 1991 will encourage employers to take steps to ensure that employment practices are not infected with unlawful motives. Early warning programs should be in place regardless of whether proof an unlawful motive is by direct or circumstantial evidence. *See Faragher,* 524 U.S. at 806-07. Responsible employers will take advantage of preventive legal counseling offered by the management bar. As was the situation in response to *Faragher*, the management bar is likely to market these pro-active legal services to clients and potential clients.

III. ARGUMENTS MADE ON BEHALF OF PETITIONER ARE NOT CONSISTENT WITH THE CIVIL RIGHTS ACT OF 1991.

A. JUSTICE O'CONNOR'S CONCURRENCE IN *PRICE WATERHOUSE* DOES NOT CONTROL THE INSTANT MATTER.

Petitioner's reliance on Justice O'Connor's concurrence in *Price Waterhouse* is misplaced because that opinion addresses what is now a superseded statutory interpretation of Title VII. When *Price Waterhouse* was decided, Congress had not yet spoken to the "mixed motives" issue. Instead, this Court had the difficult task in *Price Waterhouse* of sorting out causation issues and assigning burdens of proof without much statutory guidance. The 1991 Amendment, in addition to establishing limited liability when unlawful discrimination is a motivating factor, changed the landscape of Title VII litigation. Title VII claimants now have the opportunity to seek compensatory and punitive damages from juries. Prior to the enactment of the Civil Rights Act of 1991, seeking such damages was not an option. Nor was a jury trial an option. In sum, because Title VII has changed significantly since *Price Waterhouse* was decided, Justice O'Connor's concurrence does not control the outcome of this matter.

B. THERE IS NO BASIS TO CONSTRUE THE CIVIL RIGHTS ACT OF 1991 NARROWLY.

The Equal Advisory Council's *amicus* brief (2003 WL 834711 at *17) argues that a "narrow interpretation" of the scope of the 1991 Amendment's changes is warranted, because "[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879). This argument is faulty

because *Shaw* involved the common law of bills of lading. Congress attempted to alter a long-standing common law doctrine by modifying the law with respect to bills of lading.

In contrast, *Price Waterhouse* is a judicial interpretation of what is now an outdated version of Title VII, which was first enacted in 1964. It is a statute with no common law antecedent. This Court has stated that "[s]ound rules of statutory interpretation exist to discover and not to direct the Congressional will." *United States ex Rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943). The Preamble, Congressional Findings, Purpose, and the specific changes provided by the 1991 Amendment make it elementary to discover the Congressional will: Congress wanted to strengthen and improve federal discrimination laws. Moreover, because the 1991 statutory language of section 107(a) of the Act is clear it is not even necessary to explore Congressional intent.

C. FEARS OF A GREATER LIABILITY RATE ARE NO BASIS TO REQUIRE DIRECT EVIDENCE IN MIXED MOTIVE CASES.

Petitioner argues that absent a direct evidence requirement to trigger the mixed-motive analysis, the burden of proof will be shifted to the employer in almost all cases. This argument is faulty because the employee must first prove that unlawful discrimination was a motivating factor for the employment action. Only then does the burden shift to the employer to show that the employment action would have occurred regardless of the unlawful discrimination.

The legislative history of the 1991 Amendment includes a statement that a Justice Department report indicated that plaintiffs had won almost 80 percent of the mixed-motives cases after the *Price Waterhouse* decision. H.R. Rep. No. 102-40, pt. 1, at 157-58 (1991) (minority views). However, very little information about these cases is provided in the legislative record. Because *Price Waterhouse* was

decided in 1989, only a relatively small sample of cases could have been gathered in the two years before the passage of the 1991 Act.

This Court should view the 1990 era Justice Department report with skepticism because more comprehensive recent studies have shown that employees seldom are victorious in court. One study found that between 1992 and 1998 employers prevailed in 93% of employment discrimination cases decided on the merits at the trial level and that employers prevailed in 84% of cases which were subsequently appealed. There was also some evidence in the study that employee victories were reversed at a greater rate on appeal. Michael Selmi, EMPLOYMENT DISCRIMINATION AND THE PROBLEMS OF PROOF: A SYMPOSIUM, *Why are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555 (2001). A report by the *Bureau of Justice Statistics Special Report: Civil Rights Complaints in U.S. District Courts, 1990-1998, available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc.pdf (3/26/2003), states that for civil rights cases, dismissals increased from 66% in 1990 to 71% in 1998.

Consequently, it appears that employers effectively use summary judgment procedures for cases arising under the Civil Rights Act of 1991. Regardless of whether there is a direct evidence requirement in mixed-motive cases, the employee still has the burden of proof to establish that unlawful discrimination is a motivating factor. The overall experience of the courts subsequent to the 1991 Amendment strongly suggests that summary judgment proceedings will continue to result in a large majority of dismissals of civil rights cases.

D. JURY INSTRUCTIONS CAN BE CRAFTED AS NEEDED TO STATE CORRECTLY MIXED MOTIVE LAW UNDER THE CIVIL RIGHTS ACT OF 1991.

The Civil Rights Act of 1991 creates challenges for Courts to fashion proper jury instructions correctly reflecting the law. This problem was inevitable once Congress authorized jury trials in Title VII cases. Courts, in putting together jury instructions, are dealing with statutory constructs with no common law antecedent. In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), a case arising after the 1991 Amendment, this Court determined that the employee was entitled to a jury instruction on punitive damages. Justice O'Connor came to this conclusion after carefully construing 42 U.S.C. §1981a. *Id.* at 534-36. The Court's ruling in *Kolstad* provides guidance to lower courts in crafting Title VII punitive damages instructions and the review of those instructions by the courts of appeals. *See, e.g., Romano v. U-Haul Intern.*, 233 F.3d 655, 669 (1st Cir. 2000).

This Court has a similar opportunity to provide direction in the construction of jury instructions in mixed motive cases. The approach of the *en banc* majority below should be adopted. First, the trial court should analyze the evidence. If the court "determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination play *no* role at all in the employer's decision-making," then a mixed motive instruction should not be used. *Costa v. Desert Palace*, 299 F.3d 838, 856 (9th Cir. 2002) (emphasis added).

The mixed motive instruction provided by the *Costa* trial court is adequate. The essence of the instruction to the jury was that:

> If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated similarly even if the plaintiff's gender had played no role in the employment decision.

The instruction is proper because the first paragraph accurately summarizes the law as stated in 42 U.S.C. §2000e-2(m). Likewise, the second paragraph correctly summarizes the law as stated in 42 U.S.C. §2000e-5(g)(2)(B).

Wolff v. Brown, 128 F.3d 682 (8th Cir. 1997), also considered jury instructions in mixed motive cases. The Eighth Circuit stated that it was not plain error to give the following instructions:

> Your verdict must be for the Plaintiff . . . on Plaintiff's sex discrimination claim if all the following elements have been proved by a preponderance of the evidence: first, Defendant discharged Plaintiff; and second, Plaintiff's sex was a motivating factor in Defendant's decision. If either of the above elements has not been proved by a preponderance of the evidence, your verdict must be for the Defendant and you need not proceed further in considering this claim.
>
> If you find in favor of Plaintiff on his sex discrimination claim, then you must answer the following question in the Verdict Form: "Has it been proved

> by the preponderance of the evidence that Defendant would have discharged Plaintiff regardless of his sex?"

Id. at 684. The only problem with this instruction is that Mr. Wolff failed to object at trial that the instruction did not place the burden of proof on the employer to show that he would have been discharged regardless of his sex, as required by 42 U.S.C. §2000e-5(g)(2)(B). Consequently, the last sentence of the instruction should read:

> "Has Defendant proved by the preponderance of the evidence that it would have discharged Plaintiff regardless of his sex."

Finally, it has been suggested by *amici* who support Petitioner that jury instructions in mixed motive cases will be unwieldy in certain situations where age discrimination or section 1981 claims are brought with Title VII claims. While these combinations are certainly possible, the instant case is not one of them. The Court should wait to tackle these thorny issues when an appropriate case is presented for review.

CONCLUSION

In light of the clear purpose of the Civil Rights Act of 1991, *amicus* respectfully requests that this Court uphold the decision of the Ninth Circuit in favor of the Respondent.

Respectfully submitted,

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